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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 911

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VERNA LOYD GARLAND, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

HAYDEN C. COVINGTON
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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Verna Loyd Garland petitions this court for a writ of certiorari. He shows unto the court as follows:

1. *Opinion of the court below:*

The opinion of the United States Circuit Court of Appeals is not yet reported. It appears in the record. [41-43] *

2. *Jurisdiction.*

The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court on May 7, 1934.

* Bracketed figures appearing in this petition refer to pages of printed transcript of record.

3. *Timeliness of this petition.*

The judgment of affirmance was rendered and entered on December 3, 1946. [43] Upon application duly made the time for filing petition for certiorari was enlarged to and including January 20, 1947. Petition for writ of certiorari is filed within the enlarged time.

4. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 615.82, 622.44, 622.51, 623.1, 623.2, 625.1, 625.2, 626.1, 626.2, 626.3, 627.13, 629.1-629.35 of the Selective Service Regulations (32 C.F.R. Supp. 615.82 *et seq.*) promulgated by the President under said Act.

5. *Questions presented.*

(1) Did the court below err in failing to order the indictment dismissed because the undisputed evidence, fully developed, showed that the local board, which issued the order supporting the indictment, failed to make a record of oral evidence given at a personal appearance as required by the Selective Service Regulations, thereby depriving petitioner of a full and fair hearing before the board of appeal, contrary to the due process clause?

(2) Did the court below err in failing to order the indictment dismissed because the undisputed evidence showed that the administrative agency, at the time of the final classification, arbitrarily and capriciously denied petitioner his claim for exemption as a minister and classified him as liable for training and service without basis of fact?

(3) Did the court below err in failing to hold that the trial court should have granted petitioner's motion for judgment of acquittal presented at the close of all the evidence, because the undisputed fully-developed evidence showed that the order supporting the indictment was void?

(4) Did the court below err in holding that the order of the draft board was valid and there was no proof showing that the board was biased or prejudiced against petitioner or that its action was arbitrary, when the undisputed evidence showed that the board failed to allow petitioner his rights of procedural due process?

(5) Did the issuance of the order to report for induction more than ninety days after preinduction physical examination, which was contrary to the Regulations, make the order null and void so as to excuse petitioner from reporting as ordered?

Statement of Case

Form of Action

This criminal action was instituted in the District Court of the United States for the Western District of Texas by return of an indictment charging petitioner with violation of Selective Training and Service Act, as amended, and the regulations thereunder. [1]

The indictment charged that petitioner was a person required to comply with the provisions of the selective service law, and that he unlawfully and knowingly failed to report and submit himself to induction into the armed forces of the United States, in accordance with the order of the local board. [1-2]

Thereafter petitioner pleaded "not guilty". [4] A jury was duly waived [3], and the trial before the court began on March 4, 1946. [3] The Government presented its case to the court and rested, and thereupon petitioner rested also. [21] Whereupon the court found petitioner guilty as charged in the indictment, and entered final judgment committing him to the custody of the Attorney General for a period of three years, on March 6, 1946. [25-27]

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. [28]

After the case was filed in the court below, it was duly submitted for decision on November 11, 1946. [41] On December 3, 1946, the court below held that the judgment should be affirmed. [41-43] The judgment of affirmance was duly entered. [43]

Facts

Petitioner, now 31 years of age, registered under the Selective Training and Service Act of 1940, on October 16, 1940, with Local Board No. 1 for Leon County, Texas. [4, 5, 19] He was thereupon assigned Order Number 1451 by said board. [9] He timely filed a Selective Service Questionnaire as required of him. [5] In his questionnaire and continuously since the date of his registration he claimed to be entitled to a IV-D classification as an ordained minister of Jehovah's witnesses, which claim was rejected by his local board. [16]

His first classification by the local board was IV-E (the classification given a conscientious objector). [5] On the strength of an investigation conducted by the local board among the neighbors of petitioner, his IV-E classification was later changed to I-A (available for combatant military service). [5-6] This change of classification was based on the oral evidence of petitioner's neighbors, which evidence was also made the basis of the local board's rejection of his claim for Class IV-D as an ordained minister. [5-17]

There was no evidence in his file disputing the evidence and claim that he was a duly recognized minister of religion, representing a religious organization known as Jehovah's witnesses and, as its legal governing body, the Watchtower Bible and Tract Society. There was no evidence that petitioner did not fit, as a minister of religion, Opinion Number 14 of National Headquarters of Selective Service System concerning the ministerial status of Jehovah's witnesses; that he did not stand in relation to Jehovah's

witnesses in the same way that the recognized orthodox clergy stand toward their congregations; that he did not perform ceremonies that are ordinarily performed by ministers of religion under the Act. This was freely admitted by the draft board officials who had handled his case. [4-17]

Shortly after petitioner registered he appeared in his own behalf before the local board and gave oral testimony concerning his ministerial status. [17] This testimony was received and considered by the board in determining petitioner's classification. [18] Within the proper time petitioner duly appealed from the I-A classification of the local board to the Board of Appeal, which board likewise retained him in class I-A by unanimous vote [6], but the oral evidence of petitioner and his neighbors which was made the basis of the local board's classification was never reduced to writing, summarized and placed in petitioner's file for the benefit of the board of appeal, which board was never given the opportunity of passing upon that testimony. [17]

Pursuant to the final classification of the board of appeal in 1942, petitioner was ordered to report for induction into the armed forces, but declined to do so on the grounds that he was a minister of religion and therefore exempt from military service under the Act. For thus failing to report he was indicted, tried and convicted, and on November 20, 1942, sentenced to three years in a correctional institution where he served twenty-nine months before being released on probation. [7, 22-23]

On May 19, 1944, while Garland was detained in prison he was given his last *"preinduction physical examination"* pursuant to Section 629.1, Selective Service Regulations. [15] This preinduction physical examination was given eleven months before he was paroled from prison, and thirteen months prior to the time he was ordered for the

second time to report for induction into the armed forces of the United States by his local board. [9, 15, 16]

On June 1, 1945, Garland's local board ordered him to report for induction at Centerville, Texas, on June 11, 1945. [9] His refusal to comply with this order was made the basis of this prosecution. [2] What authority the local board had to issue the order of induction is not revealed by the record. Upon Garland's release from prison, the local board reclassified him again in I-A. From this classification he appealed. As to the action of the board of appeal in this regard the record is silent. [19] There is nothing in the record to indicate what classification the board of appeal gave petitioner, or whether or not the board of appeal has acted on Garland's appeal.

How Issues Raised

At the close of all the evidence petitioner moved for judgment of acquittal. [21] The court found petitioner guilty. [21-22] Petitioner excepted to the finding. [22]

The court below, in its opinion, affirmed the judgment of the trial court, holding that petitioner failed to show that the board violated his procedural rights, that the board was biased or prejudiced against him or that its action was arbitrary, and for that reason held that the judgment should be affirmed. [41-43]

Specifications of Error

The Circuit Court of Appeals for the Fifth Circuit erred—

(1) in affirming the judgment of conviction;

(2) in failing to order the judgment reversed and the indictment dismissed; and

(3) in failing to reverse the judgment and order a new trial.

Reasons Relied on for Granting the Writ

The failure of the court below to hold that petitioner was entitled to a dismissal of the indictment because the undisputed evidence showed that there was a violation of procedural due process by the administrative agency in withholding evidence from the board of appeal, by failure to reduce to writing evidence considered by the local board conflicts with *Kwock Jan Fat* v. *White,* 253 U. S. 454.

The Regulations require that the local board reduce to writing and place in the registrant's file all oral evidence submitted by him pertaining to his occupational status and classification. Section 615.82 provides, *inter alia,* "Every paper pertaining to the registrant, except his Registration Card . . . shall be filed in his Cover Sheet."

"The registrant's classification shall be made solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; . . . Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." (Section 623.2. See also Section 625.2 (b), Regulations.)

"If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts." (Section 627.13 (b))

Section 627.13 (b) of the Regulations required the local board to "carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete." The local board disregarded the regulations and acted in complete defiance thereof, thus flouting the law and showing utter contempt for petitioner's right under the regulations.

The undisputed evidence showed that the local board failed to reduce to writing and place in Garland's file vital oral evidence submitted by him at a personal appearance relative to his status under the Act. When he was at the hearing he offered extensive additional oral evidence which was concededly received and considered by the local board. [17] The local board, although it did consider the oral evidence, did not reduce it to writing and place it in the cover sheet as required by the regulations. [17] The board of appeal did not see or have an opportunity to consider all the additional evidence. It did not know of the action of the local board in withholding vital oral evidence received and considered.

Certainly Congress and the President did not intend to give the local boards unlimited power to withhold and keep from the appellate agencies evidence offered to it and considered by it under the regulations. This is especially true because classifications upon appeal are made *de novo* and such classification should be made according to the status of the registrant at the time of the classification rather than at the time of the registration of the registrant. *United States ex rel. Hull* v. *Stalter,* 151 F. 2d 633.

In *Kwock Jan Fat* v. *White,* 253 U. S. 454, the administrative agency omitted and suppressed testimony of important witnesses favorable to the applicant. On appeal to the Commissioner of Immigration, the administrative determination was affirmed. In spite of the fact that Congress had given great power to the Secretary of Labor in the exclusion of Chinese immigrants, the court held that the failure to reduce to writing oral evidence received and considered by the commissioner was a failure to preserve that type of a record for the use of the appellate agency and the courts that is required by due process of law.

The position here taken is supported by the decisions of the United States Second Circuit Court of Appeals in *United States ex rel. John M. Kulick*, appellant, v. *Kennedy*, 157 F. 2d 811, opinion by Judge Learned Hand. In the *Kulick* case the facts with respect to the failure to reduce to writing the evidence given at the hearing before the local board on personal appearance were substantially the same as in this case. What the court said in the *Kulick* case would be applicable in this case. In its *Kulick* opinion the court said:

"At that time he submitted an affidavit and a written statement, asserting that he was a 'regular or ordained minister' of Jehovah's Witnesses; and he testified at length. (There was no stenographer present, and the only record of what he said is his own testimony at the trial and that of one member of the board whom he then called.)"

"He appeared on the 11th, but there is no record of what took place except that his classification was not disturbed."

"Be that as it may, in the case at bar that was not the sum of what Kulick showed, and tried to show, and incidentally, as we have said, the record before the board did not preserve any testimony there taken. Surely it can never be tenable to make critical what chances to be preserved in that record. Evidence is no less evidence because it is not recorded; and anything which in fact tends to establish that the accused did not have a fair hearing must be available in support of his defense, from whatever source it comes."

The withholding of evidence by the local board denied the final and real classifying agency of the Selective Service System the right to a full review of defendant's case. The act of the local board was tantamount to a denial of the right of appeal. It is a denial of procedural due process so as to make the order upon which the indictment is based void and the same as though no order had been issued. Under these circumstances the court below should have held that the illegality of the order was ground for a dismissal of the indictment and a remand of the case to the Selective Service System. *Tung* v. *United States* (CCA-1) 142 F. 2d 919. The decision of the court below conflicts directly with the *Tung* decision. Cf. *United States* v. *Peterson* (DC-ND-Calif.) 53 F. Supp. 760; *United States* v. *Lair* (DC-ND-Calif.) 52 F. Supp. 393; *Ex parte Stanziale* (CCA-3) 138 F. 2d 312. It should be observed in the *Tung* case that the Government accepted the decision of the First Circuit as the law by not applying for certiorari, which was available to it.

The failure of the court below to hold that there was no basis in fact for the classification given petitioner who, at all times while his case was before the boards, was a minister, and the failure to hold that, in denying his claim for exemption the board acted arbitrarily and capriciously, is in direct conflict with the holding of the United States Seventh Circuit Court of Appeals in *United States ex rel. Hull* v. *Stalter,* 151 F. 2d 633, where the facts are substantially the same as those in the case at bar. Moreover, the holding of the court below is out of harmony with the dictum expressed on the same question in *Lehr* v. *United States* (CCA-5) 139 F. 2d 919, 921-922, and in *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944, 949. The holding of the court below in refusing to revoke the action of the draft boards against petitioner who was preaching as a minister is directly in conflict with decisions of this

court in *Murdock* v. *Pennsylvania* (1943) 319 U. S. 105, 106-109, 110, 111, 117, and *Follett* v. *McCormick*, 321 U. S. 573, where the facts in reference to the ministerial activity were identical with the facts in this case. In those decisions this court held that the activity of Jehovah's witnesses occupied the same high estate as does orthodox preaching from the pulpit. Furthermore, the court held that the preaching activity of Jehovah's witnesses was more than preaching. It was a combination of pulpit preaching and evangelism.

The narrow orthodox construction placed upon the terms of the Act and Regulations providing for exemption of ministers of religion is a decision on an important question that is probably in conflict with the applicable decisions of this court. *Trinidad* v. *Sagrada Orden de Predicatores de la Provincial del Santisimo Rosario de Filipinas*, 263 U. S. 578; *Helvering* v. *Bliss*, 293 U. S. 144.

There are important questions of federal law presented upon this petition which have not been but which should be settled by this court.

In determining whether or not the trial court erred in refusing the motion for judgment of acquittal, it is necessary for this court to consider definition of the terms "regular minister of religion" and "duly ordained minister of religion" used in Section 5 (d) of the Act. (54 Stat. 885, 50 U. S. C. App. § 305) In this connection the court is required to determine (1) whether a broad and liberal interpretation should be placed upon the ministerial exemption in the Act so as to include the regular and duly ordained ministers of every recognized religious organization in the United States, or (2) whether a narrow interpretation should be placed upon the Act confining the exemption to only such ministers as come within the definition of ministers of religion according to standards and precepts of the popular orthodox sects and denominations.

WHEREFORE, your petitioner prays that this court issue a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit directing such court to certify to this court for review and determination on a day certain to be therein specified, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and petitioner further prays that the judgment of said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court, be here set aside and petitioner dismissed from custody or, in the alternative, the judgment be reversed and the cause remanded for a new trial consistent with this court's opinion; and that your petitioner be granted such other and further relief in the premises as to this court may seem just and proper in the circumstances.

VERNA LOYD GARLAND
Petitioner

By HAYDEN C. COVINGTON
Counsel for Petitioner

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CITATIONS

731070—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 911

VERNA LOYD GARLAND, PETITIONER

v.

UNITED STATES OF AMERICA

No. 916

WILLIAM ANTON WELLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Each petitioner is a Jehovah's Witness. They were separately indicted in the United States District Court for the Western District of Texas for refusing to report for induction, in violation of Section 11 of the Selective Training and Service Act (50 U. S. C. App. 311) (No. 911, R. 1-2; No. 916, R. 1-2). At their separate

trials before the court, a jury having been waived in each case (No. 911, R. 3; No. 916, R. 3), it was undisputed that they were finally classified I–A (No. 911, R. 19; No. 916, R. 24); that they were thereafter ordered to report for induction, the order in each case advising the registrant that he would be physically examined at the induction station and might be rejected (No. 911, R. 9–10; No. 916, R. 7–8); that petitioners received the orders (No. 911, R. 11; No. 916, R. 27); and that they did not report for induction (No. 911, R. 10, 20. No. 916, R. 9).[1]

In No. 911, petitioner Garland rested at the close of the Government's case without offering any defense (R. 21). He was found guilty and sentenced to imprisonment for three years (R. 21–22, 25–27). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 41–43).

In No. 916, the trial court permitted petitioner Wells fully to develop his defense that the selective service boards had exceeded their jurisdiction in denying him exemption as a minister of

[1] In each case the petitioner underwent a preinduction physical examination prior to the issuance of the order to report for induction. Petitioner Garland had such an examination on May 19, 1944, and he was ordered to report for induction on June 11, 1945 (No. 911, R. 8, 15). Petitioner Wells had his preinduction physical examination on October 12, 1945, and he was ordered to report for induction on December 17, 1945 (No. 916, R. 7–8, 10).

religion and that there were irregularities in the boards' proceedings. At the conclusion of the trial, the court stated in an oral opinion (R. 66):

> The Court holds under this testimony in this case that it is insufficient to show any arbitrary action upon the part of the Board in failing to classify him as a minister; and the classification was made by the Board and confirmed by the Appeal Board on review. The Court will further state, in the opinion of this Court, and the Court here so holds and announces the evidence does not show that he is a minister within the contemplation and meaning of the Selective Training and Service Act. * * *

Accordingly, petitioner was convicted and sentenced to imprisonment for three years (R. 68–70). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 84–94). Although the Fifth Circuit recognized the applicability of the *Falbo* decision, 320 U. S. 549, the court stated that it preferred to rest its decision upon a determination of the validity of the induction order within the limits of judicial review announced in *Estep* v. *United States*, 327 U. S. 114 (R. 85, 87). The court then discussed each of petitioner's challenges to the jurisdiction of the selective service boards and found them to be without merit (R. 88–94).

In this Court, both petitioners urge that their selective service boards exceeded their jurisdiction. This contention, however, is unavailable to petitioners for, by refusing to report for induction, they failed to exhaust their administrative remedies. If petitioner Garland had reported as he was ordered to do, he would have been required to undergo a "complete examination," since his preinduction examination had occurred more than 90 days previously. Petitioner Wells, on the other hand, would have undergone a "physical inspection" to ascertain whether there had been a change in his physical condition in the period intervening between the preinduction examination and the date he was to report, and thus to determine whether at that time he was acceptable to the Army. His position is the same as that of the petitioner in *Cahoon* v. *United States,* No. 183, this Term, certiorari denied, October 14, 1946, rehearing denied January 20, 1947. See also *Hudson* v. *United States,* No. 887, this Term, certiorari denied, February 3, 1947, and our petition for a writ of certiorari in the *Balogh* case, No. 800, this Term, pp. 13–18.

On the authority of this Court's decision in *Falbo* v. *United States,* 320 U. S. 549, and *United States* v. *Balogh, supra,* decided January 20, 1947, we respectfully submit that the only contention which petitioners urge is not open to

them, and that the petitions for writs of certiorari should therefore be denied.

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